

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LORENZO FIGUEROA**

Claimant

VS.

**EXCEL CORPORATION**

Respondent

Self-Insured

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Docket No. 211,777

**ORDER**

Respondent appeals from an Award entered by Assistant Director Brad E. Avery on October 8, 1997. The Appeals Board heard oral argument April 1, 1998. Stacy A. Parkinson was appointed Board Member Pro Tem to serve in place of Board Member Gary M. Korte who recused himself from this proceeding.

**APPEARANCES**

Michael L. Snider of Wichita, Kansas, appeared on behalf of the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared on behalf of the respondent, a qualified self-insured.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The sole issue on appeal is the nature and extent of claimant's disability. The Assistant Director awarded an 81 percent work disability based on a 62 percent task loss and a 100 percent wage loss.

Respondent argues the wage loss should be treated as 0 percent because claimant would have remained employed in an accommodated job at the same wage except respondent discovered claimant had lied on his employment application. Respondent contends the wage respondent was paying claimant should continue to be imputed to an

employee terminated for lying on the application. With the imputed wage, respondent argues, the award should be limited to disability based only on functional impairment, a higher work disability should not be awarded.

Claimant describes the issue differently. Claimant argues he was terminated for filing a workers compensation claim and retaining counsel. According to claimant, the fact claimant lied on his employment application was used as a pretext for the actual reason. Claimant asserts that he, therefore, is entitled to a wage loss factor based on actual wage loss of 100 percent.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes the Award by the Assistant Director should be affirmed.

#### **Findings of Fact**

1. Claimant met with personal injury by accident with the last date worked, May 7, 1996, being the date of accident.
2. The injuries at issue were to claimant's shoulders and upper back. Claimant began having problems with his shoulders and back in April 1996. When the symptoms did not resolve after treatment provided by the company medical department, claimant was referred to Dr. Pedro A. Murati. Dr. Murati prescribed therapy as well as pain and anti-inflammatory medication.
3. As a result of an unrelated exposure to ammonia at work, claimant was referred for an interview by Ms. Dalia J. Moya, an adjuster with Crawford and Company. On May 3, 1996, Ms. Moya took a statement from claimant and during the interview claimant acknowledged a prior workers compensation claim for injury to his knee while working for IBP.
4. On his application for employment with respondent, claimant lied and concealed his employment at IBP and the prior injury, surgery, and workers compensation claim.
5. Respondent terminated claimant May 8, 1996, stating as the grounds for termination the fact claimant had provided false medical information and false information on the application for employment. The record does not support a conclusion these stated grounds were merely a pretext and does not support a finding claimant was terminated either for filing the current claim or for retaining counsel. Rather, the Board finds claimant was, in fact, terminated for providing false medical information and false information on the application for employment.

6. At the request of claimant's counsel, Dr. Lawrence R. Blaty examined claimant and evaluated the injury. Dr. Blaty opined that claimant sustained bilateral shoulder injuries which he rated as a 7 percent impairment to the body as a whole. Dr. Blaty recommended claimant avoid lifting, carrying, pushing, and pulling activities greater than 40 pounds occasionally or 15 pounds frequently and that he do no overhead lifting greater than 25 pounds occasionally or 10 pounds frequently. He recommended no prolonged flexion or extension activities with his head and neck and recommended claimant avoid use of heavy vibratory power equipment. Dr. Blaty also testified claimant has lost the ability to perform 62 percent of the tasks he performed during the 15 years of employment before this injury. Among the tasks claimant cannot now perform, in Dr. Blaty's opinion, are three of the four tasks claimant performed in his employment for respondent.

7. After the termination by respondent, claimant received unemployment compensation benefits. Respondent contested the unemployment benefits, citing the fact claimant was terminated for falsifying his application for employment. The referee awarded benefits based on a finding the termination was not for misconduct "connected with the work."

8. Claimant was not working or earning a wage at the time this case was submitted for decision. The Board finds claimant made a good faith effort to find employment. While receiving unemployment compensation benefits, claimant contacted and/or applied for employment with numerous employers as reflected in Exhibit 3 to the deposition of Karen C. Terrill taken March 12, 1997. Claimant has limited transferrable skills. He received a sixth-grade education in Mexico and has only very little ability to speak English. He used an interpreter to testify. Most of his work experience has been in the type of work he was doing for respondent.

### **Conclusions of Law**

1. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

2. K.S.A. 44-510e also provides that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the pre-injury average weekly wage.

3. If an employee is offered a job after the injury which he or she could perform but refuses to even attempt to perform the job, the wage in that job will be imputed to the claimant and if the wage is 90 percent or more of the pre-injury wage, claimant will be limited to an award based only on functional impairment. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

4. The claimant must make a good faith effort to find employment. If the claimant does make a good faith effort, the wage prong of the work disability formula will be the percentage difference between the pre- and actual post-injury wage. If the claimant does not make a good faith effort to find employment, a wage will be imputed to the claimant based on all relevant factors, including expert testimony about the claimant's ability to earn wages. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. The Board concludes claimant is, in this case, entitled to a work disability. The fact he was terminated because he lied on his application for employment does not preclude work disability. First, the Board concludes claimant could not, after the injury, continue in the work he was doing at the time of the injury. This conclusion is based on the fact the work is what caused the injuries and the fact Dr. Blaty believed claimant could no longer perform three of the four tasks he was performing in his job for respondent. Although it appears respondent may have been accommodating claimant at the time of the termination, the evidence does not establish that respondent could or would have found claimant accommodated work on a permanent basis. Second, the Board construes the Foulk and Copeland decisions as applicable to post-injury conduct, not pre-injury conduct. The difference is, in our view, significant.

Unlike the statute in effect prior to July 1, 1993, the current definition of work disability, K.S.A. 44-510e, does not mention the claimant's ability, it refers only to what the claimant is earning. A claimant can, of course, have significant control over what he or she earns after the injury. The Court addressed that concern in both the Foulk and Copeland decisions. Along the same lines as the Foulk and Copeland decisions, this Board has held that a wage may be imputed to a claimant terminated because of post-injury misconduct. Acklin v. Woodson County, Docket No. 147,322 (May 1995). Again, the goal has been to avoid the potential of manipulation inherent in claimant's post-injury conduct. The potential for manipulation of the workers compensation benefits does not exist in termination for pre-injury conduct and for that reason the Board has not applied the Foulk and Copeland rationale to termination for pre-injury conduct.

Respondent argues that giving work disability to a claimant terminated for giving false answers to the employment application has the effect of penalizing the employer for adhering to an honesty policy applicable to all employees. The respondent asserts it should not be required to treat a workers compensation claimant differently than all other employees. To this argument, the Board acknowledges the consequences for the employer may be different, the employer may have to pay higher workers compensation benefits, but nothing in this prevents the employer from terminating the employee for

cause. The consequences to the injured employee may also be different than for other employees because he/she is less able to perform the tasks he/she performed before the injury and less able to obtain employment.

Respondent also argues simply that a claimant should not receive work disability when he/she is not still working for reasons other than the injury, in this case the falsification of the employment application. The argument is that the benefits are to be given only for the results of the injury, not for the results of the employee's misconduct. The Board generally agrees with the premise but does not agree that it applies under circumstances such as these. First, as indicated, the Board has found claimant could not continue to do the job he was doing at the time of the injury and the record does not establish what other permanent work respondent might have been able to offer. Second, the termination for misconduct may be the event that places claimant into the open labor market but the restriction from the compensable work-related injury then prevents the claimant from performing the tasks he/she previously performed and may prevent the claimant from obtaining work at a similar wage. The injury is in a practical sense disabling the claimant's efforts to work and is a work disability.

Finally, respondent argues the Board should apply principles enunciated in Gassman v. Evangelical Lutheran Good Samaritan Society, Inc., 261 Kan. 725, 933 P.2d 743 (1997). That case concerned a wrongful discharge action in which the plaintiff alleged she had been wrongfully terminated in violation of the employment contract and public policy, apparently not stating what public policy. After claimant was terminated, the employer discovered claimant had, without authorization, taken and copied a videotape from the employer's offices. The evidence established that this after-acquired information would have been grounds for termination. The Court ruled that the plaintiff would not be entitled to recover damages, such as lost wages, where the evidence established a basis for the termination, even after the fact. The Board does not believe the Gassman decision applies here. The Gassman case arose in a different context, civil liability for wage loss. The issue here is not whether the employer is liable for damages but the nature and extent of claimant's disability.

For these reasons, the Board has and will continue, unless and until directed otherwise by an appellate court, to limit application of rationale expressed in Foulk and Copeland to post-injury conduct. In all other cases, the literal language will be applied and the comparison for the wage prong of the work disability formula will be comparison between the pre-injury wage and the wage claimant is earning after the injury. In this case the difference is 100 percent.

6. The Board also finds claimant has, as Dr. Blaty testified, a 62 percent task loss.

7. Claimant has, and is entitled to benefits based on, an 81 percent work disability based on a 100 percent wage loss and 62 percent task loss. K.S.A. 44-510e.

**AWARD**

**WHEREFORE**, the Appeals Board finds that the Award entered by Assistant Director Brad E. Avery on October 8, 1997, should be, and is hereby, affirmed.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Lorenzo Figueroa, and against the respondent, Excel Corporation, a qualified self-insured, for an accidental injury which occurred May 7, 1996, and based upon an average weekly wage of \$498.95, for 306.75 weeks at the rate of \$326 per week for an 81% permanent partial disability, making a total award of \$100,000.

As of May 29, 1998, there is due and owing claimant 107.43 weeks of permanent partial disability compensation at the rate of \$326 per week in the sum of \$35,022.18, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$64,977.82 is to be paid for 199.32 weeks at the rate of \$326 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael L. Snider, Wichita, KS  
D. Shane Bangerter, Dodge City, KS  
Brad E. Avery, Assistant Director  
Philip S. Harness, Director